

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220645
MATTER OF: Scipar, Inc.

DATE: February 11, 1986

DIGEST:

1. Protest alleging that agency should not have convened a second evaluation board and that protester is entitled to an award based on the initial technical evaluation results is untimely since protest was not filed within 10 working days of date protester was advised that initial evaluation results would be disregarded and that a new award decision would be made based on the reevaluation.
2. Contention that protest alleging that agency should not have convened a second technical evaluation board and that protester is entitled to an award based on the initial technical results is timely filed at GAO because no adverse action to agency protest was received is without merit. Record shows that protester never protested the convening of the second board to the agency in a timely manner and letter to protester indicated that award in accordance with the rescored technical results would be made.
3. GAO will not consider the merits of an untimely protest nor invoke the "significant issue" exception to our timeliness regulations where the untimely protest issues are not matters of first impression which would have widespread significance to the procurement community.
4. Protest alleging that agency deliberately and fraudulently changed the technical evaluation criteria set forth in the RFP is denied where record shows the agency evaluation conformed to the solicitation's requirements.

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5. A protester fails to prove that the proposal evaluation process was biased or that technical evaluations were unreasonable where no independent evidence of bias is provided and the record reasonably supports the contracting agency's technical judgment.
6. Allegation that agency improperly disclosed protester's proprietary data outside the government by employing two consultants to evaluate proposals is denied since agency may properly release proposals outside the government for evaluation purposes and no evidence of any improper disclosure has been submitted.
7. Contracting officer's affirmative determination of responsibility will not be reviewed absent a showing of fraud or bad faith and mere fact that protester is dissatisfied with agency's investigation or believes that contracting officer lacked sufficient information to determine awardee responsible does not suffice to show bad faith.

Scipar, Inc. protests the award of a contract to Phoenix Control Systems, Inc. (PCS) under request for proposals (RFP) No. 4-SP-20-04140 issued by the Bureau of Reclamation, Engineering and Research Center, Department of the Interior, Denver, Colorado. The solicitation was for the design and installation of a supervisory control system which will operate and control the San Felipe Water Conveyance System currently under construction. Scipar questions the propriety of several actions taken by Interior during the procurement and argues that its proposal should have been selected for award.

We deny the protest in part and dismiss it in part.

The solicitation was issued on September 28, 1984 and seven offers were received by the November 29, 1984 deadline for receipt of proposals. A Technical Evaluation Board (TEB) was convened to evaluate the proposals and the initial evaluation was completed on February 13, 1985. Discussions were then held and best and final offers were submitted. The TEB completed its final evaluation and submitted its final report to the contracting officer on June 6, 1985. The technical ranking of the four firms

remaining in the competition, in order of preference, was as follows: Scipar, PCS, HSQ Technology (HSQ) and Pipeline Systems, Inc. (PSI). In response to a specific request from the contracting officer, the TEB indicated that all four proposals were technically acceptable.

The contract negotiator for Interior reviewed the findings of the TEB and disagreed with the TEB's conclusion in a number of areas. Specifically, the negotiator found that the TEB had given PCS, HSQ and PSI relatively low technical scores in several areas when compared to the scores received by Scipar. The TEB's technical scores were adjusted and based on the revised technical scores which reduced Scipar's technical advantage and each offeror's proposed fixed prices, HSQ's proposal, still ranked third technically but offering the lowest price, was found to be the most advantageous to the government. The contracting officer concurred in the findings of the negotiator and a contract was awarded to HSQ on June 28, 1985.

Scipar protested the agency's determination by letter dated July 11, alleging that the award was not made in accordance with the RFP's requirements and that Interior improperly considered only price in deciding to award to HSQ. Based on the issues raised in Scipar's protest and due to questions concerning the scoring of the proposals by the TEB, the contracting officer decided to convene a second evaluation board to reevaluate the proposals. By letters dated August 13 and August 14, all four offerors were notified that a new evaluation board had been selected. The letter to Scipar indicated that the new technical evaluation would be completed by August 23, 1985 and that if it is determined that an award is to be made to other than HSQ, the contract would be terminated and a new award made.

The second TEB's technical ranking of the four proposals was as follows: PCS, Scipar, PSI, HSQ. The proposals submitted by HSQ and PSI were considered technically unacceptable. Although Scipar's and PCS's proposals were both acceptable, PCS's proposal was found technically superior to Scipar's and was also lower priced. HSQ's contract was terminated for the convenience of the government and a contract was awarded to PCS in the amount of \$995,000 on October 7. Scipar protested to our Office on October 9, and subsequently filed a complaint

with the United States District Court, Western District of New York, requesting that performance be enjoined. An order was issued suspending further performance pending the resolution of the protest.

Reevaluation Determination

Scipar argues that the contracting officer's convening of the second panel constituted an abuse of discretion. Scipar contends that the initial TEB was comprised of qualified personnel, that there was no evidence that the TEB deviated from the evaluation criteria set forth in the RFP, and that as a consequence, there was no basis for the contracting officer to challenge the TEB's technical conclusions. Scipar argues that due to the firm's protest, Interior realized that the award to HSQ was improper and that the contracting officer decided to reevaluate the proposals in order to ensure that Scipar would not be awarded the contract. Scipar contends that the application of the cost/technical tradeoff contained in the RFP to the offerors' initial technical scores and their proposed costs would result in Scipar being the highest rated offeror and that the agency should have awarded the contract to Scipar on this basis.

We find Scipar's challenge to the agency's decision to conduct a second evaluation, as well as the firm's argument that it should have been awarded the contract based on the first evaluation, to be untimely. Under our Bid Protest Regulations, protests are required to be filed not later than 10 days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1985). Interior's letter to Scipar, dated August 14, stated that a second technical evaluation would be conducted by an independent, neutral team of qualified personnel and that the rescored evaluation results would be utilized in accordance with the award criteria specified in the RFP. In our view, Scipar was clearly placed on notice that a second evaluation would be conducted and that a new award decision would be made based on the reevaluation. Since Scipar did not protest this action to our Office until October 9, it is untimely and will not be considered.

Scipar asserts that these allegations are timely in view of its agency protest. Under 4 C.F.R. § 21.2(a)(3), if a protest has been initially filed with the agency, any subsequent protest will be considered if filed within 10 days of formal notification of actual or constructive

knowledge of initial adverse agency action. Scipar argues that there was no adverse agency action to the firm's July 11 protest and that under this provision, these issues should be considered.

We disagree. First, Scipar's agency protest was filed well before Interior's determination to conduct a second evaluation and there is no evidence that Scipar ever protested this action to the agency. Second, Interior's August 14 letter, stating that it was in response to the July 11 protest filed by Scipar, informed Scipar that award would be made in accordance with the rescored technical results; in our view, this statement was clearly adverse to Scipar's position that it was entitled to an award based on the first technical evaluation. Accordingly, we cannot agree that there was no adverse agency action on the July 11 protest filed by Scipar, and since Scipar did not protest to our Office within 10 working days of its receipt of the August 14 letter, we also find no basis to consider this issue under 4 C.F.R. § 21.2(a)(3).

Finally, we note that Scipar requests that we consider these allegations under the "significant issue" exception in our Bid Protest Regulations, 4 C.F.R. § 21.2(c). The significant issue exception is exercised sparingly so that our timeliness rules do not become meaningless and is limited to issues of widespread interest to the procurement community in those instances when consideration of a case is appropriate to assume prompt resolution of legal issues that have not been previously decided. Julie Research Laboratories, Inc., B-218393, et al., May 16, 1985, 85-1 CPD ¶ 558.

We have previously decided that it is within the contracting officer's discretion to convene a new evaluation panel where the contracting officer determines that such action is necessary to ensure the fair and impartial evaluation of proposals. See General Research Corp, B-192090, Dec. 14, 1978, 78-2 CPD ¶ 414. The merits of the agency's actions in this case does not therefore involve any question whose resolution would benefit parties other than the protester and accordingly, we do not find these issues to be significant within the meaning of 4 C.F.R. § 21.2(c).

Reevaluation of Proposals

Scipar contends that the contracting officer deliberately and fraudulently changed the technical

evaluation criteria for the reevaluation. Although the second TEB was provided a copy of the evaluation factors listed in section M of the RFP, Scipar alleges that the contracting officer intentionally deleted the introductory paragraph to that section from the information provided. That paragraph stated that if an offeror's proposal exceeds the RFP's requirements a greater value factor would apply and that the evaluation would be heavily weighted by the detail and quality of the supporting documentation. Scipar argues that without these additional directions the evaluators may have reviewed the proposals based upon whether each offeror's technical response was simply adequate or inadequate and not placed the graduated emphasis on quality and supporting documentation required by the RFP. Scipar argues that this action by the contracting officer altered the evaluation criteria and that the change had a significant impact on the outcome.

Also, Scipar contends that the second TEB improperly developed its own standards in evaluating the proposals. The RFP indicated that the evaluators would utilize standards against which each proposal would be judged and Scipar notes that the initial TEB used specific forms during the evaluation which were correlated to the required technical content of the proposals. Scipar contends that the second evaluation team was not provided the same forms and argues that this change was also prejudicial.

In addition, Scipar alleges that the second evaluation team was biased and "hand-picked" by the contracting officer to ensure that Scipar would not be awarded the contract. In this regard, Scipar notes the wide disparity in the technical ranking of proposals between the first and second evaluation and also alleges that some members of the second evaluation team may have had personal knowledge of PCS's principals and employees. Scipar questions the agency's use of two outside consultants in evaluating proposals and argues that the evaluation of its proposal by these nongovernmental employees was tantamount to an illegal disclosure of the proprietary information contained therein. Under the circumstances, Scipar contends that the reevaluation could not have been totally objective and that Scipar is entitled to an award based on the initial evaluation conducted.

Interior indicates that members of the second TEB were selected based on their expertise in supervisory control

systems as well as their overall familiarity with Interior's needs and the requirements of the water delivery system to be controlled. The evaluation team was provided a copy of the evaluation criteria set forth in the RFP and had access to the same technical proposal data available to the first TEB. The contracting officer states that there was no prejudice for or against any offeror and that the second evaluation was conducted to ensure that each offeror was appropriately rated. Although one panel member was aware of the initial award decision to HSQ, that individual was directed not to divulge this information to other members of the TEB so that the evaluators would be totally neutral in their consideration of the proposals.

Concerning the technical evaluation, Interior argues that the evaluation conducted strictly adhered to the criteria specified in section M of the RFP. Also, Interior indicates that the consensus forms used by the second TEB reflected those requirements. Interior argues that the evaluation criteria were not changed in any way nor was the second TEB allowed to develop its own evaluation standards in judging the proposals. Although Interior acknowledges that some members of the second TEB may have been familiar with PCS due to the small number of firms working in this area, Interior states that the TEB was specifically instructed to evaluate each proposal on its own merits. Interior contends that all proposals were fairly evaluated, that the evaluation was conducted in accordance with the RFP and that PCS was properly awarded the contract.

The determination of the relative merits of proposals, particularly with respect to technical considerations, is primarily the responsibility of the contracting agency, not our Office, which must bear the burden of any difficulties resulting from a defective evaluation. Petro-Engineering, Inc., B-218255.2, June 12, 1985, 85-1 CPD ¶ 677. In light of this, we repeatedly have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and that their decision will not be disturbed unless shown to be arbitrary or in violation of the procurement laws or regulations. Vibra-Tech Engineers, Inc., B-209541.2, May 23, 1983, 83-1 CPD ¶ 550.

An agency must adhere to the evaluation criteria in a solicitation. See, e.g., Telecommunications Management Corp., 57 Comp. Gen. 251 (1978), 78-1 CPD ¶ 80. We find no support in this case, however, for concluding that the second TEB's overall evaluation of proposals was arbitrary

or otherwise inconsistent with the evaluation criteria set forth in the RFP. With respect to Scipar's concern that the second TEB deviated from the RFP and did not consider the quality of the proposal nor the detail and quality of the supporting documentation, our review of the record shows that these factors were considered. For example, the TEB scored proposals based on the quality of the equipment which was offered, the detail and quality of the documentation which was provided; proposals were also scored higher where the RFP's requirements were exceeded. The TEB did not rate all proposals equally where the RFP's minimum requirements were met, but rather, the quality of the response was considered and proposals were scored higher where it was determined that a higher score was warranted. Although the specific instructions advising that the evaluation would be conducted in this manner were apparently omitted from the information provided the second TEB, we do not find this action prejudicial since the actual evaluation was in conformance with these requirements.

In addition, we see nothing improper in the TEB's use of evaluation forms which differed from those utilized by the first TEB. The record shows that the TEB adhered to the evaluation scheme set forth in the RFP and there is no evidence that the TEB developed its own standards in reviewing the proposals. The TEB noted that PCS had been involved in providing larger, more complex control systems and that the experience of its key personnel was superior to that of Scipar's. In addition, PCS was found to have the best software design and the quality of the components offered was considered superior to that proposed by Scipar. We note that it is not the function of our Office to rescore proposals and the fact that the protester disagrees with the agency's determination does not establish that the evaluation had no reasonable basis. Crown Point Coachworks and R&D Composite Structures, et al., B-208694, et al., Sept. 29, 1983, 83-2 CPD ¶ 386. Based on the record, we cannot find that Interior's evaluation lacked a reasonable basis.

Furthermore, we see no evidence of fraud, bias or favoritism in the record as alleged by Scipar. Where, as here, a protester alleges that procurement officials acted intentionally to preclude the protester from receiving the award, the protester must submit virtually irrefutable proof that contracting officials had a specific and

malicious intent to harm the protester, since contracting officials are presumed to act in good faith. Lear Siegler, Inc.--Reconsideration, B-217231.2, May 30, 1985, 85-1 CPD ¶ 613. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition. Eaton-Renway, B-212575.2, June 20, 1984, 84-1 CPD ¶ 649. We have held that the opportunity for bias is not a sufficient basis to question an award of a contract, but that the protester must provide "hard facts" showing actual bias. Booz, Allen & Hamilton, 63 Comp. Gen. 599 (1984), 84-2 CPD ¶ 329.

In this regard, we note that the fact that some evaluators may have had prior knowledge of some of the individuals proposed by PCS does not demonstrate that the evaluation was not objective. See, e.g., Global Assocs., B-212820, Apr. 9, 1984, 84-1 CPD ¶ 394; Ensign-Bickford Co., B-211790, Apr. 18, 1984, 84-1 CPD ¶ 439. The TEB was instructed to evaluate each proposal on its own merits and we see no basis to conclude that the TEB's scoring reflected anything other than their reasoned judgment concerning the merits of the proposals. Martin-Miser Assocs., B-208147, Apr. 8, 1983, 83-1 CPD ¶ 373. In addition, we have often recognized that the scoring of technical proposals is inherently subjective and the fact that the second TEB's point scores differed from the initial TEB's scores does not demonstrate that the second TEB was biased or show that the second evaluation was unreasonable. See, e.g., Robert Wehrli, B-216789, Jan. 16, 1985, 85-1 CPD ¶ 43. Although Scipar apparently believes that Interior's actions in convening a second TEB and the TEB's subsequent evaluation were all designed to intentionally deprive Scipar of an award, we find no evidence, other than the protester's bare allegations, that Interior's actions were so motivated.

With respect to Scipar's allegation concerning Interior's use of two outside consultants as evaluators, we note that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.413-2(f) (1984), authorizes an agency to release proposals outside the government for evaluation purposes. In addition, we note that paragraph L.19(h) of the RFP, in advising offerors as to the restrictive legend to be placed on the proposal, states that the proposal will not be disclosed outside the government ". . . for any purpose other than to evaluate the proposal." Interior indicates that the outside consultants were utilized for evaluation purposes only and we note that

the evaluators are prohibited from further disclosure of the restricted Scipar data. See FAR, 48 C.F.R. § 15.413-2(f)(2). We see no evidence that Interior's use of the consultants was not consistent with these provisions and while Scipar asserts that release of the restrictive data may be prejudicial to the firm's future business, no evidence of any improper disclosure has been submitted.

Responsibility Determination

Scipar alleges that PCS should have been found nonresponsive because the firm misrepresented its prior experience and also because PCS is allegedly using the proprietary software of another firm, Johnson Controls, Inc. Several employees of PCS were former employees or consultants to Johnson Controls and Scipar argues that PCS offered as relevant experience work performed by the employees at Johnson Controls. In addition, Scipar notes that litigation is pending concerning PCS's alleged misuse of Johnson Controls' proprietary data and that the contracting officer should have conducted a more thorough investigation of this matter before finding PCS responsible.

The record shows that the TEB was aware that some of the experience contained in PCS's proposal was obtained by its employees while working for Johnson Controls. The TEB narrative comments indicate that those projects were not specifically claimed by PCS as projects completed by PCS. In this regard, the RFP did not specify that the relevant experience which would be considered was limited solely to the institutional experience of each offeror and we note that an agency may properly consider the experience of a firm's personnel in evaluating its organizational experience. Energy and Resource Consultants, Inc., B-205636, Sept. 22, 1982, 82-2 CPD ¶ 258. Thus, we see nothing in Interior's consideration of the experience obtained by PCS employees while working at Johnson Controls.

In addition, although Scipar argues that Interior should have conducted a more thorough investigation of PCS in view of the ongoing litigation, Interior indicates that the unrestricted availability of certain PCS software was discussed with PCS and it was concluded that PCS would provide adequate software which would not have usage

restrictions. Our Office will not review a contracting officer's affirmative determination of responsibility absent a showing of fraud or bad faith and to make this showing, the protester must demonstrate by virtually irrefutable proof that procuring officials had a specific and malicious intent to injure the protester. Information Systems & Networks Corps., B-218642, July 3, 1985, 85-2 CPD ¶ 35. The mere fact that Scipar is dissatisfied with the agency's investigation or believes that the contracting officer lacked sufficient information to determine PCS responsible, does not suffice to show bad faith.

Finally, we note that PCS's allegedly improper use of Johnson Control's proprietary data does not provide a basis for our objecting to an otherwise valid award. A competitor's alleged use of another firm's data presents a dispute between two private parties that is not for consideration under our Bid Protest Regulations. SETAC, Inc., supra. The courts, rather than this Office, are the appropriate forum to determine the parties' rights regarding allegedly proprietary data. Telemechanics, Inc., B-203428, et al., Oct. 9, 1981, 81-2 CPD ¶ 294.

Remaining Allegations

In its comments to the agency report, Scipar raised additional grounds for protest. Scipar contends that the dollar amount of the contract awarded to PCS was inconsistent with the line item pricing data contained in PCS's proposal. Also, Scipar alleges that the awarded contract does not contain a detailed price schedule as the contract awarded to HSQ and that the contract cannot be effectively administered. In addition, Scipar argues that Interior converted a contract requirement for the installation of fiber optic cable into an option under PCS's contract. Scipar contends that it assumed, as did HSQ, that the installation might be its responsibility in preparing its offer and by treating it as an option under PCS's contract, all offerors were not evaluated on the same basis. Scipar further asserts that these facts suggest that Interior improperly conducted discussions with PCS after the receipt of best and final offers.

Interior indicates that PCS's initial offer, dated November, 1984, was in the amount of \$971,400 which included \$888,900 for contract line item numbers (CLINS) 1-19A and \$82,500 for Item A, the services of the contractor's field personnel. PCS's best and final offer corrected a \$50 arithmetic error and PCS revised its offer

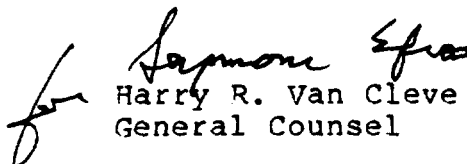
to \$913,000 for CLINS 1-19A and \$82,500 for Item A. The contract awarded was for the amount of PCS's best and final offer and we see no inconsistency between the contract amount and PCS's bidding schedule. With respect to potential difficulties Interior may have in administering the contract, we point out that contract administration is the responsibility of the procuring agency, not our Office, and such matters will not be considered under our Bid Protest Regulations, 4 C.F.R. § 21.3(f)(1).

Concerning the installation of the fiber optic cable, Interior indicates that the requirement was specified as a contingency which would be required of the contractor only if the installation was not completed by the government. Interior notes that there was no separate line item for the requirement and that offerors could not adequately price this item since the drawings and specifications necessary for the installation of the cable were not included.

Our review of the provision indicates that Interior interpretation of the provision is not unreasonable. In any event, we find no prejudice to Scipar since the cost impact does not appear significant and in view of PCS's technical superiority, the agency's award decision would not be affected.

Finally, we note that Interior denies that any discussions with PCS occurred after the receipt of best and final offers. Scipar, has presented no evidence to support its allegation and accordingly, Scipar has failed to meet its burden of proof. Metric Systems Corp., B-218275, June 13, 1985, 85-1 CPD ¶ 682.

The protest is dismissed in part and denied in part.


Harry R. Van Cleve
General Counsel